IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 893

KENNETH ALONZO TATUM,
Petitioner

v.

STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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JURISDICTION

Petitioner invoked the jurisdiction of this Court under Title 28, U.S.C.A., Section 1257(3). The Respondent denies that there is a substantial federal question presented for review by this Honorable Supreme Court.

QUESTION PRESENTED

Did the trial court err in holding that under the facts of the case the search of Petitioner's home was reasonable?

STATEMENT OF THE CASE

Respondent denies every assertion of fact in Peti-

tioner's brief except those specifically admitted herein or supported by the record.

This is a state criminal case in which the Petitioner was convicted of the offense of possession of marijuana in Criminal District Court No. 2 of Harris County, Texas. Punishment was assessed at ten years imprisonment.

Lt. Baker and Officers Strickland, Chavez, Stringfellow, Gray and Pollock, of the Narcotics Squad of the Houston Police Department, armed with a search warrant, went to the residence of Petitioner in Houston, Harris County, Texas on the night of September 14, 1961.

Officer Strickland testified that he, Officer Gray, Officer Pollock and Lieutenant Baker went to the front of the house and the Officers Chavez and Stringfellow went to the rear of the house. (S.F. p. 41) Officer Strickland testified that he could see the light was on in the living room, and he could see Petitioner and his wife sitting on the couch in the living room. Officer Strickland further testified that he walked upon the front porch and opened the screen, which was not locked. He knocked on the wooden door and a male voice said "come in." (S.F. p. 41) Officer Strickland then opened the unlocked door, entered the house, identified himself to Petitioner and his wife and presented the search warrant to Petitioner. After Petitioner, and then his wife, had read the search warrant the officers started a search of the premises.

Officers Pollock and Stringfellow corroborated Officer's Strickland's testimony although Officer Pollock was unable to hear Officer Strickland knock on the door or Petitioner's invitation to enter because he was not in the proximity of the front door.

Officer Pollock testified that Officer Strickland was the first to enter the house and that he was the last to enter the house and was about twenty feet behind Officer Strickland when Strickland entered the house. He further testified that it was dark and that he could not see or hear anybody knock. (S.F. p. 24.)

Officer Stringfellow testified that he and Officer Chavez approached the house from the rear. He further testified that when he got to the back door he could see into the house and Officer Strickland was in the living room. He then entered the kitchen through the back door which was unlocked and open and he then began to search the kitchen. (S.F. pp. 55, 56.) He was not questioned as to whether or not he heard a knock on the door or an invitation to enter.

Neither Petitioner nor his wife testified but Petitioner called Lieutenant Baker as a witness. He stated that Officer Strickland was the first person on the premises. He was off the porch when Strickland entered the house and he did not hear Petitioner or anybody on the inside say anything and did not remember whether or not Officer Strickland knocked on the door. (S.F. pp. 71-73) He further testified that Officer Strickland told Petitioner that they were police officers at about the time the door opened (S.F. pp. 68-69), and that Petitioner invited Strickland to come into the house. (S.F. p. 73)

The Petitioner offered no further defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States reads as follows:

"The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 9 of Article 1 of the Constitution of the State of Texas reads as follows:

> "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

Article 319, Vernon's Code of Criminal Procedure of the State of Texas, reads as follows:

> "The officer shall, upon going to the place ordered to be searched, or before seizing any property for which he is ordered to make search, give notice of his purpose to the person who has charge of, or is an inmate of, the place, or who has possession of the property described in the warrant."

Article 321, Vernon's Code of Criminal Procedure of the State of Texas, reads as follows:

> "In the execution of a search warrant, the officer may break down a door or a window of any house which he is ordered to search, if he can not effect an entrance by other less violent means; but, when the warrant issues only for the purpose of discovering property stolen or otherwise obtained in violation of the penal law, without designating any particular place where it is supposed to be concealed, no such authority is given to the officer executing the same."

ARGUMENT

This is not, as Petitioner would infer, a case in which the officers broke down the door and came barging in or in any way entered the home of the Petitioner without the formalities usually preceding entry into the house of another. The uncontroverted evidence shows that the officer serving the search warrant knocked on Petitioner's front door and was told to "come in" before he entered.

Generally, the test to be applied in determining whether a search and seizure is unreasonable and violative of the accused's constitutional rights is whether the thing done in sum of its form, scope, nature, incidents and effects impresses the mind as being fundamentally unfair or unreasonable in the specific situation, when the immediate end sought is considered against the private right affected: *Schermmer v. U.S.*, 232 F. 2d 855, 10 C.A. 8th, 1956, cert. den., 352 U.S. 833, 77 S. Ct. 48, 1 L. Ed. 2d 52; *Oliver v. U.S.*, 239 F. 2d 818.

Officer Strickland, armed with a search warrant, had unquestioned authority to go to Petitioner's porch and knock on the door. When Petitioner invited him to come in, although he did not know the police were present, the officers were entitled to enter.

In discussing the question of probable cause, the standard of which is akin to that of reasonableness, the California Court held in *People v. Tabor*, 193 Cal. App.2d 779, 14 Cal. Rptr. 610:

> "It is well established in our law that in determining the question, the court looks only at the facts and circumstances presented to the officer at the time he was required to act."

The Fourth Amendment to the Constitution of the United States, supra, and its state counter part, Tex. Const., Art. I, Sec. 9, condemns only those searches and seizures which are unreasonable. *Harris v. U.S.*, 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399. A search is reasonable if conducted pursuant to a properly executed legal search warrant, by consent, or incident to a lawful arrest. *People v. Loria*, 223 N.Y.S.2d 462.

Thus it is the Constitution which guarantees protection against unreasonable search and seizure, but it is the statutes, state and federal, which define the limits beyond which police officers may not transgress in the arrest of an individual or the search of himself or of his property.

The reasonableness of a search is to be determined by an analysis of the facts and circumstances of the case at bar—"The total atmosphere of the case." *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L. Ed. 653, (1950). Can there be any other conclusion than that considering the "total atmosphere" of the case at bar, the facts and circumstances attending the officer's entry, establish the reasonableness of the search and seizure incident thereto.

Officer Strickland, authorized by warrant, was invited into the Petitioner's home by a male voice which said, "come in." (S.F. p. 41.) No deceit or trickery was used to gain admittance. Officer Strickland fully satisfied all constitutional requirements both federal and state as well as the statutory law of Texas, having been admitted to the Petitioner's home under the circumstances stated, he promptly identified himself to Petitioner and his wife and exhibited the warrant to Petitioner and his wife to examine before undertaking the search authorized by it. Since there was no forceful

entry, neither Article 321 of the Texas Code of Criminal Procedure, supra, nor Section 3109 of Title 18 of the United States Code, supra, nor *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332, relied upon by Petitioner is applicable. No objection was made to the officer's entry nor was it gained by ruse or trick. Neither is it claimed that entry was gained by duress or coercion. There is, therefore, no ground for suppressing the fruits of the search.

In the now historic and far-reaching decision of this Honorable Court in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, the Court held that constitutional due process and the right to privacy requires exclusion in both federal and state courts of any evidence obtained in an unreasonable search whether it was carried out by federal officers or state officers.

The majority opinion in *Mapp v. Ohio*, supra, specifically pointed out that reasonableness is in the first instance for the trial court to determine, citing *United States v. Rabinowitz*, supra. It had previously been emphasized in *Harris v. United States*, supra, that only unreasonable searches and seizures come within the interdict of the Fourth Amendment and that each case is to be decided upon its own facts and circumstances.

Petitioner would extend the holding of *Mapp v. Ohio*, supra, to a requirement that state courts look to federal statutes rather than to their own statutes to determine the reasonableness of a search.

The Superior Court of Pennsylvania was recently called upon in the case of *Commonwealth v. Richards*, 198 Pa. Super. 39, 182 A.2d 291, (1962), to determine what judicial discretion the State of Pennsylvania maintained in the light of *Mapp v. Ohio*, supra. There-

in in a learned opinion, Judge Rhodes, President Judge, stated:

> "The decision in Mapp v. Ohio, supra, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, must be read and interpreted in the light of the actual holding therein of the Supreme Court of the United States. It was there admitted that the evidence in question had been illegally obtained as the result of an unreasonable search under the laws of the State of Ohio. In the Mapp case the Supreme Court of the United States ruled that the evidence obtained as the result of an unreasonable search and seizure cannot be used, under the Fourteenth Amendment to the Constitution of the United States, as a basis for conviction in state or federal courts. The Mapp decision did not, as we interpret it, preclude judicial determination of what constitutes a reasonable search and seizure under all the circumstances. Cf. People v. Tyler, 193 Cal. App. 2d 728, 14 Cal. Rptr. 610, 613, (1961); State v. Valentin, 36 N. J. 41, 174 A. 2d 737, 738 (1961). As we view it the Mapp decision went no further than to hold that, where the search and seizure were unreasonable under all the circumstances, evidence obtained thereunder must, under the Fourteenth Amendment, be excluded in state criminal prosecutions. Not all searches and seizures are prohibited, those which are reasonable not being forbidden. 79 C.J.S. Searches and Seizure, Section 8, page 786."

In *People v. Tyler*, 193 Cal. App. 2d 779, 14 Cal. Rptr. 610, cited by the Pennsylvania Court in *Commonwealth v. Richards*, supra, the California Court stated:

> "We find nothing in Mapp v. Ohio, supra, to indicate that as a result of that decision the states are bound to follow the federal requirements of reasonable and probable cause instead of their own."

The Honorable Nathan R. Sobel, Judge, Supreme Court, King County, New York, was author of a very learned discussion of the new horizons confronted by the states as a result of *Mapp v. Ohio*, supra, in the September, 1961 edition of *The Pleader* entitled "The Law of Search and Seizure." Judge Sobel stated therein at page 12:

> "Mapp has of course, as applied to the states, removed much of the vagueness of the Due Process Clause by making the Fourth Amendment the standard. But nevertheless it has left broad discretion within constitutional limits, to the states. For as noted later herein, the reasonableness of a search may turn upon the lawfulness of an arrest. Federal arrest statutes are in many respects different from state arrest statutes. Thus a federal search may be 'unreasonable' by virtue of an unlawful arrest under a federal statute. But the same search may be perfectly reasonable by state arrest standards"

Neither *Miller v. United States*, supra, Section 3109 of Title 18, United States Code, nor any other Act of Congress or any rule of law promulgated by any court lays down a federal rule for search by state officers for violation of state law except that the search must be reasonable within the dictates of the Fourth Amendment. No federal statute nor any court decision purports to supersede state measures of determination of reasonableness of the search of the case at bar made by police officers of the City of Houston, Texas, for the violation of a criminal statute of the State of Texas.

Texas Courts have long held that evidence obtained by an unreasonable search and seizure must be excluded from evidence. *Giles v. State*, 112 S.W. 2d 473; *Vinson v. State*, 137 S.W. 2d 1048; *Gonzales v. State*, 187 S.W. 2d 940; *Stevens v. State*, 262 S.W. 2d 716; *Townsley*

v. State, 267 S.W. 2d 410; *Giacona v. State*, 298 S.W. 2d 587; *Helton v. State*, 300 S.W. 2d 87.

In *Williamson v. State*, 244 S.W. 2d 202, (1951), the Court of Criminal Appeals stated after holding that the conviction must be reversed:

> "In view of another trial, the testimony touching the search of appellant's room should not be received. It was her private residence and came under the protection prohibiting unreasonable searches and seizures. Giles v. State, 133 Tex. Cr. R. 454, 112 S.W. 2d 473. It must be remembered that the law does not authorize the search of one's private residence upon probable cause."

While the Texas Courts have held that evidence obtained by an unreasonable search and seizure cannot be admitted they have applied Texas Statutes and the interpretation of those statutes in determination of the reasonableness of the search.

In the case at bar the Texas Court of Criminal Appeals in affirming the judgment of the trial court cited *McCown v. State*, 338 S.W.2d 732, cert. den. 368 U.S. 856, 82 S.Ct. 96.

In the *McCown* case, supra, two officers of the Houston Police Department testified that, armed with a serach warrant, they went to the defendant's apartment house for purposes of a narcotics investigation. Both officers testified that they knocked on the door and waited for a time estimated from 40 seconds to 2 to 3 minutes but that the occupants failed to respond to their knocks and an entry was forced.

In affirming the conviction and in disposing of defendant's contention that the search warrant was illegally executed the court stated:

"The relevant statutes are Article 321 Vernon's Ann. C.C.P., which provides that an officer may break down a door in order to execute a search warrant 'if he cannot effect an entrance by other less violent means;' and Article 319, supra, which provides that, 'The officer shall, upon going to the place ordered to be searched, *or before seizing any property for which he is ordered to make search*, give notice of his purpose. . . .' (Italics the Court's)

"We find nothing in the cases cited by appellant which would require us to find the instant search illegally executed, nor do we find any expression of the Supreme Court in Miller v. United States, 357 U.S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (not cited), at variance with the conclusion we here reach that the search warrant was executed in compliance with the controlling Texas statutes. The facts in support of such conclusion are set forth above in the statement of the case."

Petitioner contends that under the provisions of Article 727a, Vernon's Texas Code of Criminal Procedure, the Texas Courts may no longer apply the standards of Article 319, Vernon's Texas Code of Criminal Procedure, supra, or Article 321, Vernon's Texas Code of Criminal Procedure, supra, but must ignore the Texas statutes and abide by Title 18, Section 3109, United States Code.

The contention is without merit. It not only is against the total weight of authority which Respondent has attempted to present in some manner of logical sequence, but it is frivolous in that it would require the court to preclude the States from a judicial determination of what is reasonable under all of the circumstances. This Honorable Court has not only refused to so hold, but has specifically held otherwise in *Mapp v. Ohio*, supra, *Harris v. United States*, supra, and *United States v. Rabinowitz*, supra.

It is of interest to note the language in the majority opinion in *Miller v. United States*, supra, where at pages 305 and 306 the Court applies the law of the District of Columbia.

It is therein stated:

> "This Court has said, in similar circumstances of an arrest for violation of federal law by state officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law. United States v. Di Re, 332 U.S. 581, 589, 68 S. Ct. 222, 92 L. Ed. 210; Johnson v. United States, 333 U.S. 10, 15, 68 S. Ct. 367, 92 L. Ed. 436. By like reasoning the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia."

Respondent would urge that in light of the above language quoted from *Miller v. United States*, supra, by like reasoning the validity of the search of Petitioner's home for violation of state law by state officers is to be determined by state law.

After determining that the law of the District of Columbia would apply in arresting Miller without a warrant, the Court proceeded in the next paragraph at page 306 to interpret that law, based upon a concession of the Government that the law in question, the same being Section 3109 of Title 18, United States Code, was applicable.

It is earnestly submitted by the Respondent that the decision in *Miller v. United States*, supra, is not, as Petitioner would urge, of Constitutional dimension. The decision was limited to an interpretation of a federal statute and not the Fourth Amendment. Respondent would further support his contention that the holding in *Miller v. United States*, supra, was a statutory

interpretation and not an interpretation of the Fourth Amendment of the Constitution by the language in the dissenting opinion of Mr. Justice Clark with whom Mr. Justice Burton concurred, wherein he stated:

> "I agree that a requirement of prior notice of authority and purpose should not be given a 'grudging' application. But by the same token it should not be reduced to an absurdity. A majority of the Court of Appeals has concluded that petitioner, at the time the police entered his apartment, 'already fully understood who the officers were and that they sought to arrest him.' 100 App. DC 302; 244 F. 2d 750, 758. The entry, therefore, was held valid under District of Columbia law. This Court now superimposes upon the local rule of the District an artificial and unrealistic requirement that, even under the circumstances found here, police must make 'an express announcement' in unmistakable words that they are the police and have come to make an arrest.
>
> "The Court attempts to justify interference in local law by what it terms a 'concession' of the Government that validity of the entry must be tested by a federal statute relating to forcible entry to execute a search-warrant. But the fact that the Government seeks clarification of a general federal statute, possibly to serve its purposes in prosecutions elsewhere, is no reason for us to oblige, especially when the result is to subvert existing local law. . . ."

CONCLUSION

Respondent urges the Court that the reasonableness of the search in the case at bar, must, under all authority be determined by the laws of the State of Texas. That based upon an application of the facts of the case at bar to Article 319, Code of Criminal Procedure and Article 321, Code of Criminal Procedure, there can be no question but that the trial court correctly held and the Court of Criminal Appeals rightly affirmed that the search of Petitioner's home was reasonable and not prohibited under either the Fourth Amendment to the Federal Constitution or its counterpart, Article I, Section 9 of the Constitution of the State of Texas.

Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Allo B. Crow, Jr. Assistant Attorney General, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned case, in behalf of Respondent; I do further certify that copies of the foregoing brief have been forwarded by United States Mail, First Class, Postage-prepaid to Buck C. Miller, 407 Scanlan Building, 405 Main Street, Houston 2, Texas, Attorney for Petitioner.

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